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TRIPLE ZEST TRADING & SUPPLIERS & ORS v. APPLIED BUSINESS TECHNOLOGIES SDN BHD

FEDERAL COURT, PUTRAJAYA
ABDUL RAHMAN SEBLI CJ (SABAH & SARAWAK)
HASNAH MOHAMMED HASHIM FCJ
B NORDIN HASSAN FCJ
[CIVIL APPEAL NO: 02(f)-16-02-2022(A)]
17 OCTOBER 2023

C **Abstract** – *(i) The meaning of 'moneylender', 'moneylending' and 'interest' in the Moneylenders Act 1951 ('Act') must be read together and harmoniously. A person is still defined as a moneylender if he lends money with an interest rate, even if he does not carry on, advertises or announces himself out, in any way, as carrying on the business of moneylending; (ii) Section 10OA of the Act imposes on the alleged* D *moneylender the legal, as opposed to evidential, burden of proving, on the balance of probabilities, that it was not carrying on the business of 'moneylending' when it lent monies at a profit. The presumption is that it is carrying on the business of moneylending 'until the contrary is proved'.*

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MONEYLENDERS: *Moneylending transaction – Appeal – Borrower approached moneylender for loan – Moneylender agreed subject to loan amount being repaid in excess of principal sum or payable as 'agreed profit' – Borrower defaulted in repayment – High Court ordered borrower to pay moneylender loan amount plus* F *'agreed profit' with interest – Court of Appeal held that borrower's liability was only to repay principal loan sum with interest but not 'agreed profit' – Whether transaction moneylending transaction – Whether legal – Moneylenders Act 1951*

MONEYLENDERS: *Moneylending transaction – Burden of proof – Borrower approached moneylender for loan – Moneylender agreed subject to loan amount* G *being repaid in excess of principal sum or payable as 'agreed profit' – Borrower defaulted in repayment – High Court ordered borrower to pay moneylender loan amount plus 'agreed profit' with interest – Court of Appeal held that borrower's liability was only to repay principal loan sum with interest but not 'agreed profit' – Presumption that moneylender was carrying on business of moneylending 'until* H *the contrary is proved' – Whether moneylender discharged burden of proof that it was not carrying on business of moneylending – Moneylenders Act 1951, s. 10OA*

STATUTORY INTERPRETATION: *Moneylenders Act 1951 – Section 2 – 'moneylender', 'moneylending', 'interest' – Whether person still defined as 'moneylender' if he lends money with interest rate, even if he does not carry on,* I *advertises or announces himself out, in any way, as carrying on business of moneylending*

The first appellant had sought a loan of RM800,000 from the respondent, a company involved in the business of general trading, supplying petroleum products, construction works and information technology. The respondent agreed, subject to the loan amount of RM800,000 being repaid with another RM800,000 as 'agreed profit'. Upon the signing of the loan agreement, the first appellant deposited with the respondent, as collateral, the title deeds to two parcels of land and four undated cheques in favour of the respondent, each in the sum of RM400,000 from the first appellant's current account, with a total value of RM1.6 million. Personal guarantees were also provided by the second and third appellants, who were the directors of the first appellant, guaranteeing repayment of the loan. The first appellant, however, defaulted in the repayment of the loan sum and this prompted the respondent to commence an action, at the High Court, against the appellants. The High Court held in the respondent's favour and ordered the appellants to pay the respondent the sum of RM1.6 million, which was made up of RM800,000 loan amount plus the 'agreed profit' of RM800,000, with interest. In deciding so, the trial judge opined that, *inter alia*, the transaction was not an illegal moneylending transaction as there was no evidence that the respondent was a 'moneylender' carrying on the business of 'moneylending'; there was no evidence that the respondent had held itself out as carrying on, advertising or announcing itself as 'carrying on the business of moneylending'. Upon appeal by both parties, the Court of Appeal: (i) allowed the appellants' appeal in part and held that the appellants' liability was only to repay the principal loan sum of RM800,000 with interest but not the 'agreed profit' of RM800,000; and (ii) dismissed the respondent's appeal. Hence, the present appeal by the appellants.

Held (allowing appeal; setting aside decision of Court of Appeal)
Per Abdul Rahman Sebli CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) By cl. 1 of the loan agreement, the 'agreed profit' of RM800,000 to be earned by the respondent was the 'consideration' for the RM800,000 loan. Read with cl. 3, this 'agreed profit' of RM800,000 was, in fact and as a matter of law, 'interest' within the meaning of s. 2 of the Moneylenders Act 1951 ('Act'), as it was a sum that was 'in excess of the principal paid or payable to the moneylender'. When the respondent agreed to lend the RM800,000 to the appellants, subject to payment of another RM800,000 as 'agreed profit', it was carrying on the business of 'moneylending' within the meaning of s. 2 of the Act as it was 'lending money at interest with or without security'. The 'consideration' of RM800,000 payable to the respondent at any time before, or at the expiry of the agreement period of 30 days, was nothing but 'interest' at the rate of 100% disguised as agreed profit. By whatsoever label it was given, the RM800,000 was 'any amount by whatsoever name called in

A excess of the principal paid or payable to a moneylender'. If a rose by any other name would smell as sweet, a corpse flower by any other name would smell as foul. The trial judge erred in focusing too much on the meaning of 'moneylender' without regard to the meaning of 'moneylending' and 'interest' when the three meanings must be read
B together and harmoniously. (paras 39-42)

(2) The trial judge failed to direct His Lordship's mind to s. 10OA of the Act. It is a rebuttable presumption, a legal principle that presumes something to be true unless proven otherwise. Section 10OA of the Act imposed on the respondent the legal, as opposed to evidential, burden
C of proving, on the balance of probabilities, that it was not carrying on the business of 'moneylending' when it lent the RM800,000 to the appellants at a profit of RM800,000. The presumption was that it was carrying on the business of moneylending 'until the contrary is proved'. In the context of the present case, what it meant was that if no evidence
D was led by either side, on the question of whether the respondent was carrying on the business of moneylending, the burden of proof would not have been discharged by the respondent. Whether or not the respondent had succeeded in rebutting the statutory presumption, pursuant to s. 10OA of the Act, was essentially a question of fact. The
E court's finding must be based on hard evidence and not on conjecture that is unrelated to evidence. The Judges of the Court of Appeal, by agreeing with the trial judge, had not only perpetuated but had also compounded the error committed by the trial judge. (paras 43-46 & 48)

(3) There was not a morsel of evidence adduced by the respondent to show
F that the RM800,000 that it lent to the appellants was not lent at interest. In fact, the opposite was true in that the evidence showed, beyond the shadow of doubt, that the RM800,000 loan carried an exorbitant interest rate of 100%, which the respondent cleverly described as its 'agreed profit'. (para 57)

G ***Obiter:***

(1) The precedent that the High Court set was that an unlicensed moneylender could lend money at 100% interest without being in breach of the Act. The proposition was untenable as it was dangerous. The precedent that the Court of Appeal set was that an unlicensed
H moneylender could recover the principal loan sum but not the interest. Although less formidable than the precedent set by the High Court, the precedent set by the Court of Appeal was no less disturbing as it legitimised illegal moneylending by allowing illegal moneylenders to recover the principal loan amount in spite of the illegality of the
I transaction. (paras 20 & 34)

Bahasa Malaysia *Headnotes*

Perayu pertama telah memohon pinjaman berjumlah RM800,000 daripada responden, sebuah syarikat yang terlibat dalam perniagaan perdagangan am, pembekalan bahan-bahan petroleum, kerja-kerja pembinaan dan teknologi maklumat. Responden bersetuju, tertakluk pada syarat bahawa jumlah pinjaman RM800,000 itu harus dibayar dengan RM800,000 lagi sebagai 'keuntungan yang disetujui'. Selepas termeterainya perjanjian pinjaman, perayu pertama mendepositkan pada responden, sebagai cagaran, surat-surat hak milik atas dua bidang tanah dan empat cek tidak bertarikh atas nama responden yang masing-masing berjumlah RM400,000, daripada akaun semasa perayu pertama, nilai kesemuanya berjumlah RM1.6 juta. Perayu kedua dan ketiga, yang kedua-duanya pengarah perayu pertama, juga turut memberi jaminan peribadi mereka demi menjamin bayaran semula pinjaman tersebut. Walau bagaimanapun, perayu pertama ingkar dalam bayaran semula jumlah pinjaman dan ini menyebabkan responden memulakan satu tindakan, di Mahkamah Tinggi, terhadap perayu-perayu. Mahkamah Tinggi memutuskan berpihak pada responden dan memerintahkan perayu-perayu membayar responden RM1.6 juta, yang dikira berdasarkan jumlah pinjaman RM800,000 dan 'keuntungan yang disetujui' sebanyak RM800,000, serta faedah. Dalam memutuskan sedemikian, hakim bicara berpendapat bahawa, antara lain, transaksi tersebut bukan transaksi beri pinjam wang yang tidak sah kerana tiada keterangan bahawa responden adalah 'pemberi pinjam wang' yang menjalankan perniagaan 'beri pinjam wang'; tiada keterangan yang menunjukkan responden menyatakan dirinya sebagai menjalankan, mengiklankan atau mengumumkan dirinya sebagai 'menjalankan perniagaan beri pinjam wang'. Berikutan rayuan oleh kedua-dua pihak, Mahkamah Rayuan: (i) membenarkan sebahagian rayuan perayu-perayu dan memutuskan bahawa perayu-perayu hanya bertanggungjawab membayar semula jumlah prinsipal pinjaman iaitu RM800,000 dengan faedah tetapi tidak 'keuntungan yang disetujui' sebanyak RM800,000; dan (ii) menolak rayuan responden. Maka timbul rayuan ini oleh perayu-perayu.

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Rayuan)

Oleh Abdul Rahman Sebli HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Berdasarkan klausa 1 perjanjian pinjaman, 'keuntungan yang disetujui' berjumlah RM800,000 yang akan diperoleh oleh responden adalah 'balasan' untuk pinjaman sebanyak RM800,000. Apabila dibaca bersama-sama klausa 3, 'keuntungan yang disetujui' ini, iaitu sebanyak RM800,000, hakikatnya dan sebagai hal perkara undang-undang, adalah 'faedah' dalam maksud s. 2 Akta Pemberi Pinjam Wang 1951 ('Akta').

Apabila responden bersetuju memberi pinjam RM800,000 kepada perayu-perayu, tertakluk pada bayaran RM800,000 lagi sebagai 'keuntungan yang disetujui', responden sedang menjalankan perniagaan 'beri pinjam wang' dalam maksud s. 2 Akta kerana responden 'memberi pinjam wang atas faedah dengan atau tanpa cagaran'. 'Balasan' RM800,000 yang perlu dibayar kepada responden pada bila-bila masa atau semasa luputnya tempoh perjanjian, iaitu 30 hari, tidak lain 'faedah' pada kadar 100% yang disamarkan sebagai 'keuntungan yang disetujui'. Tidak kira apa-apa jua label yang diberi, jumlah RM800,000 itu adalah 'apa-apa jumlah dengan apa-apa jua nama yang melebihi jumlah prinsipal yang dibayar atau perlu dibayar kepada pemberi pinjam wang'. Jika mawar dengan apa-apa jua nama berbau harum, bunga bangkai dengan apa-apa jua nama tetap berbau busuk. Hakim bicara terkhilaf apabila terlalu memfokuskan pada maksud 'pemberi pinjam wang' tanpa melihat maksud 'pinjaman wang' dan 'faedah' sedangkan ketiga-tiga maksud ini mestilah dibaca bersekali dan secara harmoni.

(2) Hakim bicara gagal mengarahkan minda beliau pada s. 10OA Akta. Ini adalah satu anggapan boleh sangkal, iaitu satu prinsip undang-undang yang menganggap sesuatu itu tidak benar kecuali dibuktikan sebaliknya. Seksyen 10OA Akta meletakkan pada responden beban pembuktian undang-undang, dan bukan keterangan, atas imbangan kebarangkalian bahawa responden tidak menjalankan perniagaan 'beri pinjam wang' apabila memberi pinjam RM800,000 kepada perayu-perayu dengan keuntungan berjumlah RM800,000. Anggapannya adalah bahawa responden menjalankan perniagaan beri pinjam wang 'hingga sebaliknya dibuktikan'. Dalam konteks kes ini, maksudnya, jika tiada keterangan dikemukakan oleh kedua-dua pihak, tentang soalan sama ada responden menjalankan perniagaan beri pinjam wang, beban pembuktikan tidak dilepaskan oleh responden. Sama ada atau tidak responden berjaya menyangkal anggapan statutori ini, bawah s. 10OA Akta, adalah persoalan fakta. Dapatan mahkamah mestilah berdasarkan keterangan kukuh dan bukan tekaan yang tiada kaitan dengan keterangan. Hakim-hakim Mahkamah Rayuan, apabila bersetuju dengan hakim bicara, bukan sahaja mengekalkan bahkan menambah-burukkan lagi kekhilafan yang dilakukan oleh hakim bicara.

(3) Tidak ada secebis keterangan pun yang dikemukakan oleh responden untuk menunjukkan bahawa RM800,000 yang diberi pinjam kepada perayu-perayu tidak diberi pinjam dengan faedah. Malahan, yang sebaliknya terbukti benar kerana keterangan menunjukkan, melampaui bayangan keraguan, bahawa pinjaman RM800,000 dikenakan kadar faedah terlalu tinggi, iaitu 100%, yang responden dengan licik nyatakan sebagai 'keuntungan yang disetujui'.

Obiter:

(1) Duluan yang ditetapkan oleh Mahkamah Tinggi adalah bahawa pemberi pinjam wang tidak berlesen boleh memberi pinjam wang pada faedah 100% tanpa melanggari Akta. Saranan ini tidak boleh dipertahankan bahkan berbahaya. Duluan yang ditetapkan oleh Mahkamah Rayuan pula adalah bahawa pemberi pinjam wang yang tidak berlesen boleh menuntut semula jumlah pinjaman prinsipal tetapi tidak faedah. Walaupun kurang menggerunkan berbanding duluan yang ditetapkan oleh Mahkamah Tinggi, duluan yang ditetapkan oleh Mahkamah Rayuan tidak kurang membimbangkan kerana mengesahkan pinjaman wang dengan membenarkan pemberi pinjam wang tidak sah memperoleh jumlah pinjaman walaupun transaksinya tidak sah.

Case(s) referred to:

Dr Mansur Hussain & Ors v. Barisan Tenaga Perancang (M) Sdn Bhd & Ors [2019] 1 LNS 661 CA ***(refd)***

Ideal Advantage Sdn Bhd v. Perbadanan Pengurusan Palm Spring @ Damansara & Another Appeal [2019] 1 LNS 894 CA ***(refd)***

Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***

Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd [1979] 1 LNS 60 FC ***(refd)***

Tang Lee Hiok & Ors v. Yeow Guang Cheng [2022] 1 LNS 1510 CA ***(refd)***

Triple Zest Trading & Suppliers Sdn Bhd & Ors v. Applied Business Technologies Sdn Bhd [2023] 1 LNS 102 CA ***(refd)***

Yeow Guang Cheng v. Tang Lee Hiok & Ors [2020] 1 LNS 1696 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24(a), (b), (e), 66

Moneylenders Act 1951, ss. 2, 5(2), 10OA

For the appellants - Hong Chong Hang & Koay Jin Qian; M/s Hong Chew King

For the respondent - Ahmad Hazrin Abdul Rahman & Muzamil Aliff Mohamad; M/s Hazrin & Muzamil

[Editor's note: For the Court of Appeal judgment, please see Triple Zest Trading & Suppliers Sdn Bhd & Ors v. Applied Business Technologies Sdn Bhd [2023] 1 LNS 102 (overruled).]

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-34-03-2018 (overruled).]

Reported by Najib Tamby

JUDGMENT

Abdul Rahman Sebli CJ (Sabah & Sarawak):

[1] This appeal by the appellants is against the decision of the Court of Appeal allowing only in part their appeal against the decision of the High Court ordering them to pay RM1.6 million to the respondent by substituting it with an order that judgment be entered against the first and third appellants

for a reduced sum of RM800,000 together with interest at 4% from the date of judgment in the High Court to the date of realisation. The judgment of the Court of Appeal is reported in *Triple Zest Trading & Suppliers Sdn Bhd & Ors v. Applied Business Technologies Sdn Bhd* [2023] 1 LNS 102; [2023] 2 MLJ 374.

[2] The appellants' case before this court is that they are not liable to pay any sum of money to the respondent, not even the principal loan sum of RM800,000 that the Court of Appeal ordered them to pay back to the respondent.

[3] Having given careful consideration to the submissions of the parties, both written and oral, we allowed the appellants' appeal with costs and set aside the decision of the Court of Appeal. These are our grounds for allowing the appeal.

[4] The facts are deceptively simple. The first appellant is a family-owned company whose business address is at No. 3, Ground Floor, Lorong Kiara 1, Taman Kiara, 32020 Sitiawan, Perak and/or at C-06-05 Desa Putra, Jalan Wangsa Perdana 3, Wangsa Maju, 53300 Kuala Lumpur. The second and third appellants are its directors. The second appellant is also the mother of the third appellant and one Mumtaz Shafinaz ("Mumtaz"), who is not a party to this appeal. At the trial in the High Court, she was sued as the fourth defendant.

[5] The respondent is involved in the business of general trading, supplying petroleum products, construction works and information technology. Its registered address is at No. 73A, Jalan SS 22/23, Damansara Jaya, 47400 Petaling Jaya, Selangor. It has no licence to carry on the business of moneylending.

[6] The narrative is that the first appellant required funds for its business and approached the respondent for a loan of RM800,000, which the courts below described as a "friendly loan". The respondent agreed, subject to the loan amount of RM800,000 being repaid with another RM800,000 as "agreed profit".

[7] Upon the signing of the loan agreement, the first appellant deposited with the respondent as collateral the title deeds to two parcels of land, four undated cheques in favour of the respondent each in the sum of RM400,000 from the first appellant's current account with a total value of RM1.6 million. Personal guarantees were also provided by the second and third appellants guaranteeing repayment of the RM800,000 loan. The second appellant and Mumtaz are the co-owners of the two parcels of land.

[8] When the first appellant defaulted in repayment of the RM800,000 loan, the respondent sued the appellants and Mumtaz for, *inter alia*, the following reliefs:

(i) an order that the two parcels of land be transferred to it or, alternatively; A

(ii) the appellants pay back the amount owed amounting to RM1.6 million (the principal loan sum of RM800,000 plus the "agreed profit" of RM800,000) together with legal costs;

(iii) if para. (ii) was allowed, an order to auction the two parcels of land to recover the amount owed by the appellants. B

[9] In their defence to the suit, the appellants pleaded that they never consented to the "agreed profit" of RM800,000, that the entire transaction was an illegal moneylending transaction, that the respondent exercised undue influence on the second and third appellants into signing the personal guarantees and that Mumtaz had nothing at all to do with the loan agreement and had never pledged the two parcels of land as security for the loan. C

[10] Following a full trial, the High Court decided in favour of the respondent and ordered the appellants to pay the respondent the sum of RM1.6 million with interest at 4% from the date of judgment until the date of full settlement. This judgment sum of RM1.6 million was made up of the RM800,000 loan amount plus the "agreed profit" of RM800,000. D

[11] Of concern to this court is the finding by the learned trial judge that the RM800,000 loan with an "agreed profit" of RM800,000 was not an illegal moneylending transaction for the reason that there was no evidence that the respondent was a "moneylender" carrying on the business of "moneylending". In particular, it was the finding of the learned trial judge that there was no evidence that the respondent had held itself out as carrying on or advertising or announcing itself as "carrying on the business of moneylending". E F

[12] The finding was clearly on account of evidential deficit in the appellants' case rather than on the question of law as to whether or not the RM800,000 "agreed profit" was illegal.

[13] In arriving at such finding of fact, the learned trial judge laid emphasis on the fact that the appellants themselves had agreed to repay the principal loan sum of RM800,000 together with the "agreed profit" of RM800,000 and that the respondent had not exercised undue influence over the first appellant's directors into executing the loan agreement and guarantees. G

[14] As for the case against Mumtaz, the learned judge found, rightly in our view, that the respondent had no cause of action against her as she had nothing to do with the loan agreement, and therefore the two parcels of land that she co-owned with the second appellant could not be transferred to the respondent. The respondent accepted the finding by not appealing against that part of the decision which favoured Mumtaz. H I

[15] The approach taken by the learned trial judge in dealing with the question of whether the respondent had engaged in an illegal moneylending transaction when it lent the RM800,000 loan to the appellants subject to repayment of another RM800,000 as "agreed profit" can be seen from the following paragraphs of his grounds of judgment:

> 40. What is clear from the definitions above is that all roads lead to the definition of "moneylender". This court had scrutinised the testimony of the witnesses and found that there was no evidence that the plaintiff had ever held himself out as carrying on or advertising or announcing themselves as carrying on "the business of moneylending".
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> 41. The uncontroversial fact remains that it was SD1 and SD3 that had gone to meet SP1 for a loan and not the other way around. In this context SP1 and SD3 had described themselves generally as business persons. SD1 and SD3 wanted desperately to borrow money for purposes of business on the terms and conditions as spelled out in the loan agreement. SP1 saw this as a profitable investment and therefore agreed to grant the loan. In my view there was nothing sinister about this. It is common among the business community to lend money, at the most advantageous of terms to the Borrower, to those who desperately need money in order to alleviate the borrower's financial problems.
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> 42. As the evidence shows, there is only one loan transaction conducted in this case, which is the subject matter in this case. In other words, there is no element of continuity or system or repetition of similar transactions as the word "business" would suggest.
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> 43. Thus, although SP1 was a businessman, he was not, however, in "the business of moneylending" merely by entering into a single loan agreement with the 1st defendant. As the saying goes, "one swallow does not make a summer".

[16] The learned trial judge referred to the following provisions of the Moneylenders Act 1951 ("MA51") in coming to the conclusion that "all roads lead to the definition of 'moneylender'" and that the respondent was not carrying on the business of moneylending merely by entering into a single loan agreement with the appellants:

> Section 5(1)
>
> (1) No person shall carry on or advertise or announce himself or hold himself out in any way as carrying on the business of moneylending unless he is licensed under this Act.
>
> Section 15
>
> No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.
>
> Section 2
>
> "moneylender" means any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business.

"moneylending" means the lending of money at interest, with or without security, by a moneylender to a borrower.

"moneylending agreement" means an agreement made in writing between a moneylender and a borrower for the repayment, in lump sum or instalments, of money borrowed by the borrower from the moneylender.

[17] At para. 44 of the grounds of judgment, the learned judge reminded himself of the precautionary words of the then Federal Court in *Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd* [1979] 1 LNS 60; [1980] 2 MLJ 9 ("*Gillespie Bros*") where Salleh Abbas FJ (later LP) delivering the judgment of the court said:

At the outset we wish to observe that the Moneylenders Ordinance, 1951 does not apply to moneylending but only to Moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject-matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court. We make this simple and obvious observation because it was canvassed very strongly before us by counsel for the appellants that since the transactions between the respondents and the client are moneylending transactions, the respondents must be a moneylender and the guarantee which the appellants signed is therefore unenforceable. This submission overlooks the fact that the party to a transaction who thereby becomes the creditor may or may not be a moneylender. He is a moneylender if within the meaning of section 2 of the Ordinance he can be said to be a person "whose business is that of moneylending". **To prove business requires some sort of continuity or system or repetition of similar transactions.** (*Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1960] 1 LNS 17; [1962] AC 209 at 218: [1962] MLJ 74). (emphasis added)

[18] Then, the learned judge went on to reason out at para. 45:

45. I go further to say that it would be wrong to look at individual aspects of the transaction, for example, the "agreed profit", the late payment interest, the cheques and the land titles as indicating that the loan agreement was a money lending agreement. Looking at the transaction as a whole, including director's personal guarantees and that this was a "one off" affair, the said related collateral and securities were in furtherance of accommodating the first defendant's need to raise funds in the dire financial situation that it was in.

[19] Clearly, the focus of the learned judge's attention was on the meaning of "moneylender" without addressing his mind to the meaning of "moneylending" given by s. 2 of the MA51. For ourselves, we have no doubt that the respondent was "carrying on the business of moneylending" as the RM800,000 that it lent to the appellants was lent at interest of RM800,000. We shall elaborate on this point later in this judgment.

[20] The precedent that the High Court set was that an unlicensed moneylender can lend money at 100% interest without being in breach of MA51.

[21] We must say with all due respect to the learned judge that the proposition is as untenable as it is dangerous. First of all, under s. 5(2) of MA51, any person who carries on the business of moneylending without a valid licence commits an offence and shall be liable on conviction to a fine of not less than RM200,000 but not more than RM1 million or to imprisonment for a term not exceeding five years or to both fine and imprisonment and in the case of a second or subsequent offence shall also be liable to whipping.

[22] Going by the penalty provided for under s. 5(2) of the MA51, the crime of moneylending without licence is by no means a trivial offence. We are mindful that we are not here dealing with a criminal matter but it goes to show how serious moneylending without licence is in the eyes of the law.

[23] We agree with learned counsel for the appellants that if the court were to lend a helping hand to a person who charges exorbitant interest to claim back the principal amount lent, it would create a fertile breeding ground for illegal moneylenders also known as "Ah Long" because in the event the borrower does not repay, the principal loan amount is guaranteed to be recoverable through the court process. Ah Longs would have nothing to lose. Their only loss, if at all it can be called a loss, is that they will not be able to enjoy the fruits of the exorbitant interest rates that they charged their borrowers, but that should matter little to them as they will get back their money in full.

[24] In the present case, not only was the respondent not punished for contravening s. 5(2) of the MA51 but it was in some way given a helping hand by the court, *albeit* unwittingly. Without being derogatory, the decision of the courts below can be likened to allowing a robber to claim back his cost and expenses in a botched robbery attempt.

[25] It makes a mockery of the MA51 and the Financial Services Act 2013. While banks and licenced moneylending companies need to obtain licences and abide by strict monetary regulations, unlicensed moneylenders need only to use the term "agreed profit" in place of "interest" as "consideration" in carrying on their illegal moneylending activities.

[26] This not only goes against the object of the MA51 which is for the "regulation and control of the business of moneylending, the protection of borrowers of monies lent in such business, and matters connected therewith" (see the preamble to the MA51) but is also against the trite principle that a loss lies where it falls when an agreement is found to be illegal.

[27] Such an agreement is also void by statute. Under s. 24 of the Contracts Act 1950 ("the Contracts Act"), an agreement is void if the object or consideration of the agreement is unlawful. The section reads as follows:

> **What considerations and objects are lawful, and what not**
>
> 24. The consideration or object of an agreement is lawful unless:
>
> (a) it is forbidden by law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[28] The consideration of RM800,000 as "agreed profit" for the RM800,000 loan in the present case would be caught by paras. (a), (b) and (e) of the above provision. The court will not render assistance to those who come before it with unclean hands and the remedy of restitution under s. 66 of the Contracts Act will not avail such litigants. The remedy under that section is only available where the contract is discovered to be void or when it becomes void and not where it is void *ab initio* as is the case with the loan agreement in the present case. Section 66 of the Contracts Act is reproduced below:

> 66. When an agreement is **discovered to be void**, or when a contract **becomes void,** any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. (emphasis added)

[29] We find as apt the general pronouncements of law made by the Court of Appeal in the following two cases and one by the High Court, although the context and factual matrix of the cases differs in material respects from the present appeal:

(i) *Ideal Advantage Sdn Bhd v. Perbadanan Pengurusan Palm Spring @ Damansara & Another Appeal* [2019] 1 LNS 894; [2020] 4 MLJ 93:

> Taking the argument on illegality point, it is trite that the effect of any illegal transaction will result in the "loss lies where it falls". A party that suffers loss due to an illegal contract, cannot sue the other contracting party to recover losses. The law will not afford relief to those who claim entitlements from an illegal act.

(ii) *Dr Mansur Hussain & Ors v. Barisan Tenaga Perancang (M) Sdn Bhd & Ors* [2019] 1 LNS 661; [2019] MLJU 1552:

> Suffice for us to say here that if an agreement is void *ab initio* for illegality, no restitution can happen. No court will lend its hands to unwind a void agreement that was illegal *ab initio* by restoring each party to its original position as though the illegal agreement never took place.

(iii) *Yeow Guang Cheng v. Tang Lee Hiok & Ors* [2020] 1 LNS 1696 (affirmed by the Court of Appeal in *Tang Lee Hiok & Ors v. Yeow Guang Cheng* [2022] 1 LNS 1510):

> To deter unlicensed moneylenders from continuing with their nefarious business, it is in the public interest for unlicensed moneylenders to be deprived of their illegal "principal loan sums", interest and whatever ill-gotten property or benefit enjoyed from their unlawful moneylending business.

[30] Dissatisfied with the decision of the High Court, both parties appealed to the Court of Appeal – the appellants against the whole of the decision and the respondent against that part of the decision that disallowed the transfer of the two parcels of land or ordering the lands to be auctioned off to satisfy the debt.

[31] In the Court of Appeal, the appellants' argument was twofold: (i) that the learned judge erred in failing to consider that the respondent never rebutted the presumption under s. 10OA of the MA51 that it was a moneylender and; (ii) that the learned judge erred in holding that the loan agreement and guarantees were valid when the entire transaction contravened various provisions of MA51.

[32] In allowing the appellants' appeal in part, the Court of Appeal held that the appellants' liability was only to repay the principal loan sum of RM800,000 with interest at 4% from the date of the High Court decision until the date of realisation but not the "agreed profit" of RM800,000 that the High Court had also ordered the appellants to pay to the respondent. The respondent's appeal on the other hand was dismissed in totality and it was further ordered to return the title deeds of the two parcels of land to the second appellant and Mumtaz within 14 days.

[33] From the grounds of judgment, it is clear that the decision of the Court of Appeal to allow the respondent to claim back the principal loan sum of RM800,000 minus the "agreed profit" of RM800,000 was premised on the following two grounds, one factual and the other legal:

(i) the respondent had adduced sufficient evidence to rebut the statutory presumption under s. 10OA of the MA51 on the balance of probabilities;

(ii) in the case of a "friendly loan" like the present case, no interest ought to be chargeable by the lender.

[34] The precedent that the Court of Appeal set was that an unlicensed moneylender can recover the principal loan sum but not the interest. Although less formidable than the precedent set by the High Court, the precedent set by the Court of Appeal is no less disturbing as it legitimises illegal moneylending by allowing illegal moneylenders to recover the principal loan amount in spite of the illegality of the transaction.

[35] Arising from the Court of Appeal decision, the appellants obtained leave to appeal to this court for the determination of the following questions of law:

(i) whether a loan agreement which charges an interest at the rate of 100% within a period of 30 days is legal under the law?

(ii) if the answer to question (i) is illegal, whether the court should still assist the moneylender to recover the principal amount lent?

(iii) whether as long as a person who does not "carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending", he will not be defined as a moneylender despite him lending money at an interest rate of 100% per month?

(iv) whether the Moneylenders Act 1951 only regulates moneylenders and if a person was found to be not a moneylender, he is at liberty to enter into loan agreement charging any interest rate including interest at the rate of 100% per month?

(v) whether a person who is not defined as a moneylender can lend money at any interest rate?

[36] We have said in para. 16 above that the learned trial judge referred to those provisions of the MA51 in coming to the conclusion that the respondent was not carrying on the business of "moneylending". The learned judge should not have stopped at those provisions. He should have gone on to apply his mind to the meaning of "interest" given by s. 2 of the MA51, which is of crucial importance in determining whether the respondent was carrying on the business of "moneylending" when it lent the RM800,000 to the appellants with the "agreed profit" of RM800,000.

[37] The word "interest" is defined by s. 2 of the MA51 as follows, and the context does not require otherwise:

> "interest" does not include any sum lawfully charged in accordance with this Act by a moneylender for or on account of stamp duties, fees payable by law and legal costs but, save as aforesaid, **includes any amount by whatsoever name called in excess of the principal paid or payable to a moneylender** in consideration of or otherwise in respect of a loan.
>
> (emphasis added)

[38] This definition of "interest" must be read into the relevant terms of the loan agreement in determining if the respondent was or was not carrying on the business of "moneylending". The relevant terms of the agreement are in the following clauses:

> **1. Loan Amount to the Borrower and Agreed Profit to the Lender.**
>
> In consideration of the sum of Ringgit Malaysia Eight Hundred Thousand (RM800,000) only ("the Agreed Profit") which shall be payable by the Borrower to the Lender as the Agreed Profit to the Lender from this transaction, the Lender hereby agrees to lend and the Borrower hereby agrees to Borrow the sum of Ringgit Malaysia Eight Hundred Thousand (RM800,000) only ("the Loan Amount") to the Borrower on the terms set out hereunder.
>
> **2. Disbursement of loan to Borrower**
>
> It is agreed between the Parties that disbursement of the Loan amount will not be made to the Borrower before the expiry of three (3) business days after the conclusion of this contract. During the said period of three (3) business days, the Borrower may terminate this contract at will. It is further agreed that the Lender shall not be entitled to interest for the period preceding the date upon which the Loan is disbursed to the Borrower.
>
> **3. Loan Period**
>
> This loan shall endure for a period of thirty (30) days from the 23rd of September 2016 to 22nd October 2016 ("the Loan Period") and shall thereafter be payable in whole by the Borrower to the Lender based on the terms set forth hereunder.
>
> **4. Repayment of Loan and Security for Repayment.**
>
> 4.1 The Borrower shall repay to the Lender the Loan Amount together with the agreed profit to the total of Ringgit Malaysia One Million Six Hundred (RM1,600,000) only ("the Repayment Amount") immediately upon cessation of the Loan Period or at any time prior to the cessation of the Loan Period;
>
> 4.2 The Borrower shall be required to deposit the following security to the Lender at the point of signing of this agreement:
>
> a. third party collateral in a form of two parcels of land ("the lands") described as:
>
> i. Lot PT 9952, Luas Lot 4694.3 Meter Persegi, Pasir Panjang, Mukim Setiawan, Daerah Manjung, Negeri Perak;
>
> ii. Lot PT 9951, Luas Lot 2018 Meter Persegi Pasir Panjang, Mukim Setiawan, Daerah Manjung, Negeri Perak, and
>
> b. Four (4) undated cheques issued from the Borrower's Current Account at the Amount of Ringgit Malaysia Four Hundred Thousand (RM400,000) only each, with a total value of Ringgit Malaysia One Million Six Hundred Thousand (RM1,600,000) only.

[39] So, by cl. 1 of the loan agreement, the "agreed profit" of RM800,000 to be earned by the respondent was the "consideration" for the RM800,000 loan. Read with cl. 3, this "agreed profit" of RM800,000 was in fact and as a matter of law "interest" within the meaning of s. 2 of the MA51, as it was a sum that was "in excess of the principal paid or payable to the moneylender".

[40] Therefore, when the respondent agreed to lend the RM800,000 to the appellants subject to payment of another RM800,000 as "agreed profit", it was carrying on the business of "moneylending" within the meaning of s. 2 of the MA51 as it was "lending money at interest, with or without security".

[41] The "consideration" of RM800,000 payable to the respondent at any time before or at the expiry of the agreement period of 30 days was nothing but "interest" at the rate of 100% disguised as "agreed profit". By whatsoever label it was given, the RM800,000 was "any amount by whatsoever name called in excess of the principal paid or payable to a moneylender". If a rose by any other name would smell as sweet, a corpse flower by any other name would smell as foul.

[42] The error by the learned trial judge was in focusing too much on the meaning of "moneylender" without regard to the meaning of "moneylending" and "interest" when the three meanings must be read together and harmoniously. This had led to an error of judgment by the learned trial judge on the issue of liability.

[43] The learned trial judge fell into another serious error of law when he failed to direct his mind to s. 10OA of the MA51 which reads:

> Where in any proceedings against any person, **it is alleged that such person is a moneylender,** the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending until the contrary is proved. (emphasis added)

[44] It is a rebuttable presumption, a legal principle that presumes something to be true unless proven otherwise. Section 10OA of MA51 imposed on the respondent the legal (as opposed to evidential) burden of proving, on the balance of probabilities, that it was not carrying on the business of "moneylending" when it lent the RM800,000 to the appellants at a profit of RM800,000. The presumption is that it was carrying on the business of moneylending, "until the contrary is proved".

[45] As to what constitutes sufficient discharge of proving a case "on the balance of probabilities", Lord Denning explained in *Miller v. Minister of Pensions* [1947] 2 All ER 372:

> If the evidence is such that the tribunal can say "We think it more probable than not" the burden is discharged, **but if the probabilities are equal, it is not.** (emphasis added)

[46] In the context of the present case, what it means is that if no evidence was led by either side on the question of whether the respondent was carrying on the business of moneylending, the burden of proof would not have been discharged by the respondent. Whether or not the respondent had succeeded in rebutting the statutory presumption under s. 10OA of the MA51 is essentially a question of fact. But the court's finding must be based on hard evidence and not on conjecture unrelated to evidence.

[47] By not even addressing his mind to s. 10OA of the MA51, it was not possible for the learned trial judge to have come to the right decision on the question of whether the respondent had succeeded in discharging its legal burden of proving that the single or "one-off" loan that it gave to the appellants was not moneylending "at interest".

[48] With due respect to the learned judges of the Court of Appeal, by agreeing with the learned trial judge that the presumption of moneylending under s. 10OA of the MA51 had been rebutted by the respondent on the balance of probabilities, they had not only perpetuated but had compounded the error committed by the learned High Court Judge. There was no such finding of fact by the learned trial judge. This is how the Court of Appeal dealt with the matter at para. [44] of its grounds of judgment:

> [44] On this issue, we agree with the High Court judge that as a matter of fact, the presumption of moneylending has been rebutted by the plaintiff. This is a case where the first defendant, the borrower, had sought out the plaintiff when it was in dire financial straits. The trial judge found that not a shred of evidence was adduced by the defendants in this case to show that the plaintiff had held itself out as carrying on or advertising or announcing themselves as carrying on 'the business of moneylending'. He also found that based on the testimony of witnesses, there was only a single loan transaction, which is the subject matter in this case. This led the trial judge to the conclusion **that there was no element of continuity or system or repetition of similar transactions to prove the 'business' of moneylending.** (emphasis added)

[49] It was an affirmation by the Court of Appeal of the High Court's finding that there was no evidence that the respondent had held itself out "in any way as carrying on or advertising or announcing itself as carrying on the business of moneylending" and that the loan agreement between the respondent and the appellants was a mere "one-off" transaction, and hence the saying "one swallow does not make a summer" that the learned High Court Judge used to pigeon home the point.

[50] Having erroneously agreed with the learned trial judge that the respondent had succeeded in rebutting the presumption under s. 10OA of the MA51, the Court of Appeal then proceeded to make its own finding of fact that the respondent had indeed rebutted the presumption on the balance of probabilities. It gave the following reasons for making such a finding of fact at para. [48] of the grounds of judgment:

> [48] We are of the view that even if the rebuttable presumption has arisen under s. 10OA of the Act that the plaintiff is presumed to have carried on moneylending business, we find as a fact that plaintiff had adduced sufficient evidence to rebut this presumption on a balance of probabilities. The evidence of SP1 that the plaintiff was in the business of information technology is undisputed by the defendants. The loan agreement was with the plaintiff who carried on an information technology business. There is no evidence or sufficient proof before the trial court that the plaintiff was engaged in a moneylending business. There was also no evidence that the plaintiff had loaned money to borrowers in the past. In the absence of such evidence, we are of the view that the plaintiff had successfully rebutted the presumption under section 10OA.

[51] With due respect to the Court of Appeal, it fell into the same error as did the High Court when it found no evidence that the respondent was engaged in a moneylending business, which is another way of saying that the appellants led no evidence at the trial to discharge their burden of proving that the respondent was carrying on the business of moneylending.

[52] This is wrong because by the reversal of the onus of proof by s. 10OA of the MA51, the burden was not on the appellants to prove that the respondent was carrying on the business of moneylending. Rather, the burden was on the respondent to prove to the contrary that it was not carrying on the business of moneylending.

[53] In our view, the error stems from the reliance by both courts below on *Gellespie Bros* (*supra*). That was a case that was decided before s. 10OA of the MA51 was enacted and which only came into force on 15 April 2011 *vide* Act A1390. That explains why, in the absence of such provision, the Federal Court in that case required evidence of "some sort of continuity or system or repetition of similar transactions" before a person can be said to be carrying on the business of moneylending. The reliance by both the High Court and the Court of Appeal on the case was therefore misconceived and had misguided them into thinking that the burden was on the appellants to prove that the respondent was carrying on the business of moneylending.

[54] One thing for certain is that the Federal Court was not in that case called upon to decide on the effect of any statutory presumption like s. 10OA of the MA51. That is the context in which the decision must be understood. It has no application to the factual matrix of the present case.

[55] The presumption under s. 10OA of the MA51 applied against the respondent as a matter of law and not "even if" it applied as implied by the Court of Appeal. It applied as a matter of law because it was alleged in the pleadings that the respondent was a moneylender. This automatically kicked in the presumption that the respondent was carrying on the business of moneylending "until the contrary is proved." Failure to rebut the presumption must lead to a finding that the presumed fact is true.

[56] To successfully rebut the presumption under s. 10OA of the MA51, the respondent must prove on the balance of probabilities that by entering into the loan agreement with the appellants, it was not engaging in an act of "lending of money at interest, with or without security, by a moneylender to a borrower", which is the meaning ascribed to the word "moneylending" by s. 2 of the MA51.

[57] In the present case, there is not a morsel of evidence adduced by the respondent to show that the RM800,000 that it lent to the appellants was not lent at interest. In fact, the opposite is true in that the evidence shows beyond the shadow of a doubt that the RM800,000 loan carried an exorbitant interest rate of 100% which the respondent cleverly described as his "agreed profit". The respondent has indeed pushed profiteering to a new level.

[58] On the facts and the law applicable, our answers to the leave questions are as follows:

Leave Question i – Negative.

Leave Question ii – Negative.

Leave Question iii – Negative.

Leave Question iv – Negative.

Leave Question v – Negative.

[59] It was for all the reasons given that we allowed the appellants' appeal with costs of RM60,000 and set aside the decision of the Court of Appeal. My learned sister Justice Hasnah Mohammed Hashim and my learned brother Justice Nordin Hassan have read this judgment in draft and have agreed with it.